

12

# TRANSCRIPT OF RECORD.

---

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 281.

---

MERRILL-RUCKGABER COMPANY, APPELLANT,

vs.

THE UNITED STATES.

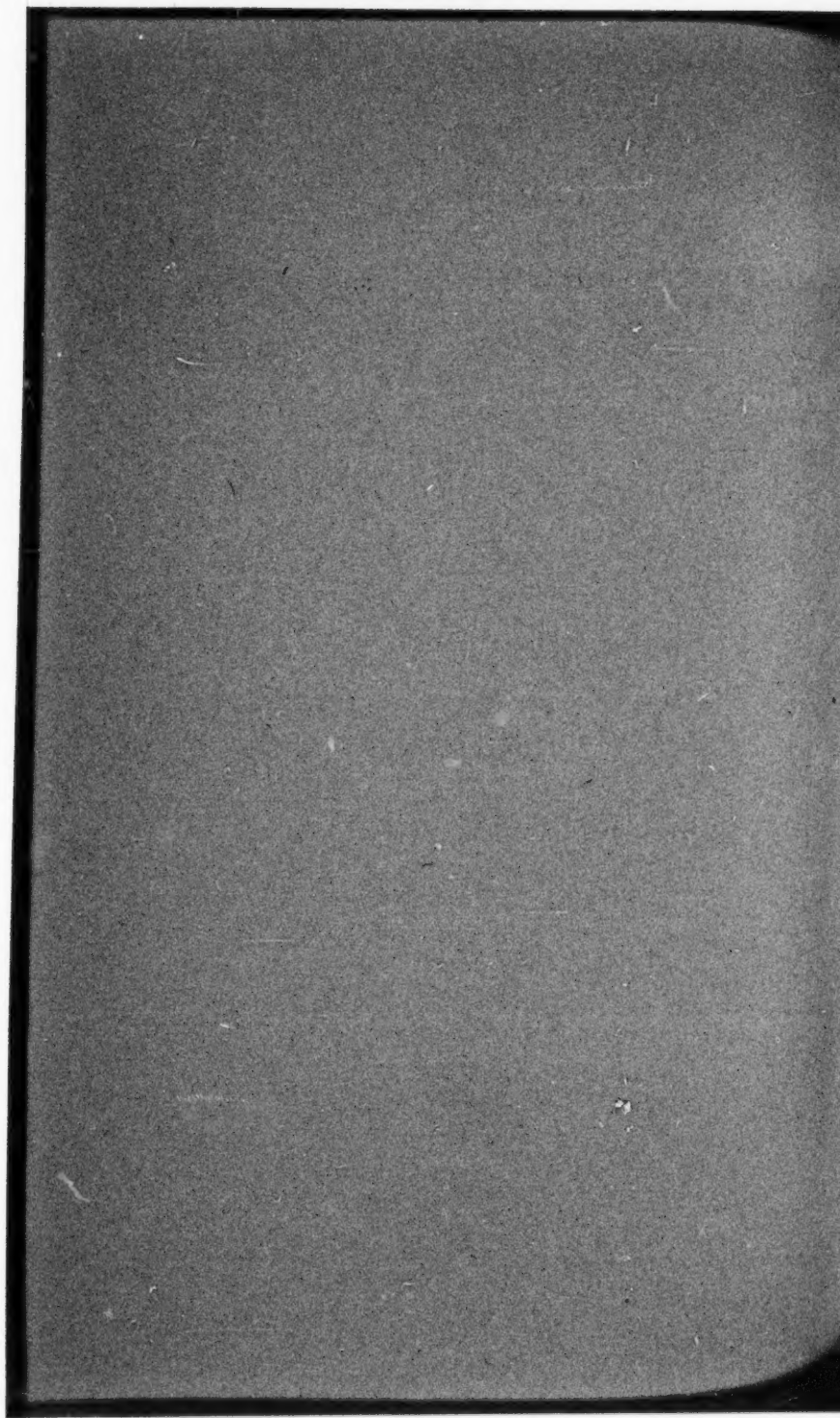
---

APPEAL FROM THE COURT OF CLAIMS.

---

FILED NOVEMBER 12, 1914.

(24,435)



(24,435)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 281.

---

MERRILL-RUCKGABER COMPANY, APPELLANT,

*vs.*

THE UNITED STATES.

---

APPEAL FROM THE COURT OF CLAIMS.

---

INDEX.

	Original. Print	
Petition .....	1	1
Traverse .....	6	3
Argument and submission of case.....	7	4
Findings of fact and conclusion of law.....	8	4
Opinion, Atkinson, J.....	15	11
Judgment of the court .....	18	13
Application for and allowance of appeal.....	19	14
Certificate .....	20	14



1      I. *Petition. Filed June 11, 1910.*

In the Court of Claims of the United States.

No. 30699.

MERRILL-RUCKGABER COMPANY, a Corporation, Claimant,  
vs.  
THE UNITED STATES OF AMERICA.

To the Honorable the Judges of the United States Court of Claims:

The petition of the Merrill-Ruckgaber Company, a corporation, respectfully shows:

I. Your petitioner is a corporation duly created and existing under the laws of the State of New York for the purpose of carrying on a general engineering and contracting business and has its office and place of business in the city and State of New York. Your petitioner has at all times borne true faith and allegiance to the Government of the United States and it has not in any way aided or abetted or given encouragement to rebellion against the said Government.

2      II. That on or about the 24th day of May, 1909, your petitioner entered into and executed a contract in writing with the United States of America, which was represented in the making and execution thereof by J. B. Reynolds, Acting Secretary of the Treasury, for the construction of the foundation for the extension, remodeling, etc., of the United States Assay Office in New York, N. Y., for the sum of \$79,400.00, in accordance with the specifications forming a part thereof, dated February 26, 1909, and the addendum to said specifications, dated March 18, 1909.

Said original specifications, in the fourth paragraph thereof, under the head of "Excavation," contained the following clause, to wit: "The walls, etc., will have to be removed and the excavation made in such a manner as not to endanger adjoining property nor prevent the occupancy of the present front building, and all necessary shoring, underpinning, etc., in connection therewith must be done." This clause, by said addendum to said specifications made prior to the execution of said contract, was modified as follows: "Page 7, 4th paragraph, under 'Excavation,' after the clause 'and all necessary shoring, underpinning, etc., in connection therewith must be done,' add 'in the case of the building joining the north line of the site, the underpinning of the main rear walls must be carried to rock by a method satisfactory to the Supervising Architect.'"

Said contract and the specifications and addendum to said specifications are here brought into court and it is prayed that they may be referred to and taken as a part hereof.

III. At the time the aforesaid contract was entered into and at all times during the progress of the work thereunder the only build-

ing "joining the north line of the site" having any rear walls as set forth in the aforesaid addendum to said specifications was the building and premises known as numbers 27 and 29 Pine Street, New

3        York city. While your petitioner was proceeding faithfully and strictly to conform to its said contract and said specifications and addendum requiring it to underpin to rock the main rear walls of said building 27 and 29 Pine Street, it received directions in writing from the Supervising Architect of the Treasury also to underpin to rock the "rear wall" of the building and premises known as No. 25 Pine Street, New York city. As said building had no rear wall "joining the north line of the site" of the work of excavation covered by your petitioner's said contract, your petitioner protested against being required to do any underpinning to rock in connection with said building, and on said Supervising Architect persisting in his order for this additional work, your petitioner appealed to the Secretary of the Treasury, and on or about November 6, 1909, the Acting Secretary of the Treasury addressed a letter to the petitioner ratifying and confirming the order for this work given by said Supervising Architect and directing your petitioner to underpin to rock said building No. 25 Pine Street in accordance with said order.

IV. Your petitioner therefore proceeded with and fully and satisfactorily completed the work required by its said contract and received compensation therefor in accordance with the terms of its said contract, and also proceeded with and completed, under protest, the underpinning to rock of said building 25 Pine Street, New York city, which was not covered by the provisions of said contract and specifications, but was wholly additional and supplemental thereto, and said additional and supplemental work was duly accepted by the defendant acting through its officers and agents authorized to accept the same, and the defendant received and has ever since enjoyed the benefit thereof.

And this petitioner avers that in complying with said orders and directions and in doing said additional and supplemental work of underpinning to rock said premises 25 Pine Street it expended for labor and materials necessarily entering into the same over  
4        and above the work done and materials furnished under said contract the sum of four thousand four hundred seventy-five dollars and ninety cents (\$4,475.90).

Wherefore your petitioner claims that an obligation arose upon the part of the defendant to pay to it said sum of \$4,475.90, the fair and reasonable value of said additional and supplemental work, but your petitioner says that no payment has ever been made to it by the defendant for or on account of any of said work and the materials and labor entering into the same, and it is justly entitled to recover of the United States the total amount thereof, to wit, the sum of \$4,475.90.

V. Your petitioner says that no assignment or transfer of its aforesaid claim, or any part thereof or interest therein, has ever been made, and your petitioner is entitled to the amount above stated after allowances of all just credits and offsets.

Wherefore your petitioner prays judgment against the United States of America for the total sum of \$4,475.90.

MERRILL-RUCKGABER COMPANY,  
By OGDEN MERRILL, *President*.

Attest:

ALBERT RUCKGABER,  
*Secretary.*

STATE OF NEW YORK,  
*City of New York, ss:*

I, Ogden Merrill, being first duly sworn, do depose and say that I am the president of the Merrill-Ruckgaber Company, a corporation, which corporation is named as party claimant in the foregoing petition. I have read said petition and know the contents thereof, and the facts therein stated are true to the best of my knowledge, information and belief.

OGDEN MERRILL.

5 Subscribed and sworn to before me this 10th day of June,  
A. D. 1910.

[Seal of Laura E. Smith, Notary Public, Kings County.]

LAURA E. SMITH,  
*Notary Public, Kings County.*

Certificate filed in New York County.

McKENNEY & FLANNERY,  
*Attorneys for Claimant,*  
*Hibbs Building, Washington, D. C.*

6 H. Traverso. Filed March 31, 1914.

In the Court of Claims of the United States, December Term, A. D.  
1913.

No. 30699.

MERRILL-RUCKGABER CO.  
vs.  
THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

HUSTON THOMPSON,  
*Assistant Attorney General.*  
J. R. W.

III. *Argument and Submission of Case.*

On March 31, 1914, this case came on to be heard. Mr. John Spalding Flannery was heard for the claimant; Mr. Charles F. Jones was heard in opposition and the case was submitted.

IV. *Findings of Fact, Conclusion of Law, and Opinion.*  
*Filed June 1, 1914.*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

*Findings of Facts.*

## I.

The claimant is a corporation duly created and existing under the laws of the State of New York for the purpose of carrying on a general engineering and contracting business, with its principal office and place of business in New York City.

## II.

On or about February 26, 1909, the United States, acting therein through the Supervising Architect of the Treasury, invited proposals for the construction of the foundation for the extension, remodeling, etc., of the United States assay office building in the city of New York, in accordance with drawings and specifications prepared in the Office of said Supervising Architect. These specifications contained among other the following provisions:

Under the heading of "Extent of work":

"The bidders should visit the site and fully inform themselves of the character of the same and the conditions under which the work is to be performed, and failure to do so will in no way relieve the successful bidder from the necessity of furnishing any materials or performing any labor that may be required to complete the work in accordance with the true intent and meaning of the specifications and drawings without additional cost to the Government."

Under the heading "Explanations of drawings":

"This specification is intended to supplement the drawings, and therefore it will not be the province of the specification to mention any portion of the construction which the drawings are competent to explain, and such omission is not to relieve the contractor from carrying out such portions only indicated on the drawings, and

9 should items be required by the specifications not indicated on the drawings they are to be supplied, even if of such nature that they could have been indicated thereon. Any items which may not be indicated on the drawings or mentioned herein, but are necessary to complete the entire work, must be supplied in place. The decision of the Supervising Architect as to the



proper interpretation of the drawings and specifications shall be final."

Under the heading "Excavation":

"Certain portions of old foundation walls, etc., have been left in place as retaining walls in connection with adjoining buildings; the removal of these walls and the north wall and so much of the present front building as may be necessary to install work under this contract and such other excavation in connection therewith as may be necessary are to be included. \* \* \*

"The walls, etc., will have to be removed and the excavation made in such a manner as not to endanger adjoining property nor prevent the occupancy of the present front building, and all necessary shoring and underpinning, etc., in connection therewith must be done."

### III.

Subsequently, and on or about March 18, 1909, said Supervising Architect sent to all parties from whom proposals had been solicited the following addendum, amending the foregoing paragraph of the specifications:

"Bidders are hereby informed that the specification is to be amended as follows: Page 7, fourth paragraph, under 'Excavation,' after the clause 'and all necessary shoring, underpinning, etc., in connection therewith must be done,' add 'In the case of the building joining the north line of the site the underpinning of the main rear walls must be carried to rock by a method satisfactory to the Supervising Architect.'"

### IV.

On April 2, 1909, after receipt by it of said addendum, the plaintiff submitted its proposal to furnish all labor and material required for said work for the sum of \$79,400, and on May 22, 1909, the United States, acting therein through J. B. Reynolds, Assistant Secretary of the Treasury, sent the claimant a communication accepting its said proposal in the following language:

"In accordance with department approval of the 18th instant, your proposal, dated April 2, 1909, the lowest received under advertisement of February 26, 1909, and opened April 3, 1909, in amount seventy-nine thousand and four hundred dollars (\$79,400.00), is accepted to furnish all the labor and materials required for the construction of the foundation for the extension, remodeling, etc., of the United States, assay office building, New York, N. Y., in strict accordance with drawings numbered 101 and 102, such other drawings as may be furnished, the specification dated February 26, 1909, and the addendum thereto dated March 18, 1909, and the instructions of the superintendent.

"One set of drawings and specifications is forwarded herewith for your use, and any additional sets desired will be furnished you upon application to the Supervising Architect.

10 "It is understood and agreed that the entire work is to be completed by December 31, 1909, instead of November 1,

1909, the time named in your proposal, this extension being made to correspond with the delay in awarding the work.

"It is understood and agreed that you are required to execute a formal contract, with bond, in the sum of one hundred and twenty five thousand dollars (\$125,000.00), guaranteeing the faithful performance of the work embraced in this acceptance, a form for which will be forwarded you. This contract, with bond, must be executed in strict accordance with the rules printed at the head of said form and be returned to the Supervising Architect of this department at once. \* \* \*

## V.

On or about May 24, 1909, the United States, acting therein through J. B. Reynolds, Acting Secretary of the Treasury, entered into a contract in writing with the claimant for the performance of said work for said price of \$79,400. Said contract contained, among others, the following pertinent provisions:

"Witnesseeth, that the party of the second part, for the consideration hereinafter mentioned, covenants and agrees to and with the party of the first part to furnish all of the labor and materials and do and perform all the work required for the construction of the foundation for the extension, remodeling, etc., of the United States assay office in New York, N. Y., in strict and full accordance with the requirements of drawings numbered 101 and 102, and such other detail drawings and models as may be furnished to the party of the second part by the Supervising Architect of the United States Treasury Department; the advertisement for proposals, dated February 26, 1909; the specification for the work; the proposal dated April 2, 1909, addressed to the said Supervising Architect by the said party of the second part; and letter dated May 22, 1909, addressed to the said party of the second part by J. B. Reynolds, Assistant Secretary of the Treasury, accepting said proposal; and the addendum, dated March 18, 1909, to said specification; a true and correct copy of each of which said papers is attached hereto and forms a part of this contract; and which said numbered drawings, bearing the signature of the said Supervising Architect and the signature of the said party of the second part, are on file in the office of the Supervising Architect of the United States Treasury Department, and are hereby made part of this contract.

"It is further covenanted and agreed by and between the parties hereto that the said party of the second part will, without expense to the United States, comply with all the municipal building ordinances and regulations, in so far as the same are binding upon the United States, and obtain all required licenses and permits, and be responsible for all damages to person or property which may occur in connection with the prosecution of the work; that all work called for by the drawings and specifications, though every item be not particularly shown on the first or mentioned in the second, shall be executed and performed as though such work were particularly shown and mentioned in each, respectively, unless otherwise specifically pro-

11 vided; that all materials and work furnished shall be subject to the approval of the said Supervising Architect; and that said party of the second part shall be responsible for the proper care and protection of all materials delivered and work performed by said party of the second part until the completion and final acceptance of same.

"It is further covenanted and agreed by and between the parties hereto that the said party of the second part will make any omissions from, additions to, or changes in, the work or materials herein provided for whenever required by said party of the first part; the valuation of such work and materials to be determined on the basis of the contract unit of value of material and work referred to; or, in the absence of such unit of value, on prevailing market rates, which market rates, in case of dispute, are to be determined by the said Supervising Architect, whose decision with reference thereto shall be binding upon both parties, and that no claim for damages on account of such changes or for anticipated profits shall be made or allowed.

"It is further covenanted and agreed that no claim for compensation for any extra materials or work is to be made or allowed, unless the same be specifically agreed upon in writing or directed in writing by the party of the first part, and that no addition to, omission from, or changes in the work or materials herein specifically provided for shall make void or affect the other provisions or covenants of this contract, but the difference in the cost thereby occasioned, as the case may be, shall be added to or deducted from the amount of the contract, and in the absence of an express agreement or provision to the contrary no addition to or omission from or changes in the work or materials herein specifically provided for shall be construed to extend the time fixed herein for the final completion of the work.

"It is further covenanted and agreed by and between the parties hereto that all materials furnished and work done under this contract shall be subject to the inspection of the Supervising Architect, the superintendent of the building, and of other inspectors appointed by the said party of the first part, with the right to reject any and all work or material not in accordance with this contract, and the decision of said Supervising Architect as to quality and quantity shall be final."

## VI.

The assay office extension was located practically in the middle of the block bounded by Wall, Nassau, Pine, and William Streets. The buildings surrounding the site of the excavation for the work were the old assay office on the south, the subtreasury on the west, the two buildings, 25 Pine Street and 27 and 29 Pine Street, on the north, and the Gallatin Bank Building on the east.

The building known as 25 Pine Street was 10 stories, and the building known as 27 and 29 Pine Street was 13 stories above Pine Street, and each of these buildings was one story higher at the line of the assay office extension.

When the claimant submitted its detail drawings showing the proposed method of underpinning and protecting walls of the Pine

Street buildings, the Supervising Architect telegraphed to the claimant on August 3, 1909, as follows:

"Referring to blue prints submitted by you showing underpinning buildings Pine Street, please state why drawing does not show underpinning 25 Pine Street extending to rock."

12 To which the claimant replied on the same day:

"We are in receipt of your telegram under date of August 3, and in reply will say that according to the 'addendum to the specifications for the foundation of the extension, remodeling, etc., of the United States assay office building at New York, N. Y.,' we understand that the 'building' referred to means 27-29 Pine Street, as No. 25 Pine Street has no rear wall; it is simply a light metallic curtain wall which is supported on the side walls. We did not consider that there was any rear wall in this building, therefore we showed the side walls to be taken care of in the usual manner and believe our method so provides."

Thereupon much correspondence ensued between the claimant and the Supervising Architect in reference to the contract requirements and necessity for underpinning to rock of the building No. 25 Pine Street, and on October 20, 1909, the claimant was directed by the Supervising Architect to proceed with the work of underpinning said building, 25 Pine Street, to rock, as follows:

"The receipt is acknowledged of your letter of the 15th instant, and the statements made therein are noted. In reply you are advised that the position of the office in regard to underpinning to rock of No. 25 Pine Street in connection with your contract for the foundations of the extension, remodeling, etc., of the assay office, New York, N. Y., was fully set forth in its letter of the 2d instant, and the office is of the opinion that this work is required by the terms of your contract and that you are not entitled to extra therefor. You are therefore directed to carry out this portion of your contract without further delay and in accordance with office letter of the 2d instant."

The claimant thereupon on October 28, 1909, notified the Supervising Architect that the estimated cost of underpinning to rock the two southernmost columns of the east and west walls of said building, 25 Pine Street, would be \$4,800 in addition to the price named in said contract, and concluded its said communication with the following statement:

"As the contract does not expressly or impliedly require us to underpin to rock premises 25 Pine Street, we shall proceed with the work under the contract, taking necessary steps to protect said premises, but will not underpin any portion thereof to rock except upon the understanding that we are to be paid the reasonable cost thereof, as indicated above."

To which the Supervising Architect replied, on October 30, 1909:

"Your statements are noted and you are now directed to proceed without further delay to complete the work in line with office letters of the 2d, 20th, and 26th instants, and without expense to the Government. And you are advised that unless you take action along this line within a reasonable time consideration will be given to serv-

ing the eight days' notice preparatory to the Government assuming charge of the work and completing it at your expense."

Upon appeal to the Secretary of the Treasury the action of the Supervising Architect was ratified, and the claimant was directed in writing by the Secretary to proceed with said underpinning in accordance with the requirements of the Supervising Architect, otherwise the contract would be completed at claimant's expense. The claimant did the work under protest, and completed it and all of the work under said contract within the time stipulated in the contract. The actual cost of underpinning to rock said building No. 25 Pine Street was \$4,450. The contractor was paid the full amount of the contract price, \$79,400.

## VII.

In order to underpin said premises to rock, the claimant was required to sink two cylinders, one under the last column on the east side of the building, 25 Pine Street, and one under the last column on the west side of said building. To do this it was necessary to remove the earth from under these columns and sink the cylinders to rock in the excavations made for them. In connection with the sinking of the cylinder under the east side of the building a drift or tunnel, 10½ feet long, 6 feet wide and 6 feet high, had to be run from the extreme rear of the foundation to a point under the column and from this drift the cylinder was sunk to rock, to a depth of approximately 40 feet. On the west side a drift 5 feet wide, 5 feet deep and 6 or 7 feet high was made and a similar cylinder sunk to the same depth. Each cylinder or caisson was built of concrete and steel and was 3½ feet in diameter.

## VIII.

Prior to the receipt by the claimant of the order of the United States to protect the rear wall of the building, No. 25 Pine Street, by underpinning to rock, claimant had proposed to protect said building by means of horizontal beams projecting through the building and supported on the ground by blocks and posts called rakers and needle beams. This was the method adopted as to the Gallatin Bank Building, the foundation of which extended below the depth of the proposed excavation.

The cost of the method of protecting by shoring up with timbers was nominal as compared with the cost of underpinning.

## IX.

The use of the word "building" in the addendum to the specifications was the result of a clerical error in the Office of the Supervising Architect of the Treasury. Between the date of the issuing of the specifications and the time of opening the bids the drafting and construction division of the Supervising Architect's office concluded that it was necessary to underpin to rock the two buildings, 27 and 29 Pine Street and 25 Pine Street, and, in order that the bid

and subsequent contract might cover all of the work, that division prepared a memorandum for the addendum to the specifications to be sent to all bidders, which read:

"Bidders are hereby informed that the specification is to be amended as follows:

" 'Page 7, fourth paragraph, under 'Excavation,' after the clause 'and all necessary shoring, underpinning, etc., in connection therewith must be done,' add 'In the case of the buildings joining north line of the site the underpinning of the main rear walls must be carried to rock by a method satisfactory to the Supervising Architect.' "

14 This memorandum for the addendum was, in due course, sent to the computing division of said office, where the word "buildings" was inadvertently changed to "building" in the addendum to the specifications, which was sent to claimant under date of March 18, 1909.

Before submitting a proposal for the work the claimant, through its president and agents, made an investigation of the site of the work and the buildings surrounding said site, and ascertained that the rear of both the buildings, Nos. 25 and 27 and 29 Pine Street, were closed to said site on the north.

In the main rear walls of said buildings the weight above the first floor was transferred to and carried on columns.

The claimant, under the direction of the Supervising Architect, protected both of said buildings adjoining on the north by underpinning to rock in the manner following: The three columns which supported the building, 27-29 Pine Street, were underpinned; that is, excavations were made to rock under these columns and concrete piers were built up until they were keyed under these columns or girders, thus forming vertical piers from the girders down to bed-rock, and under the foundations supporting the two columns of 25 Pine Street similar concrete piers were carried to rock.

## X.

The building known as 25 Pine Street was 10 stories in height above Pine and 11 stories above Wall Street.

The main rear wall of the building 27 and 29 Pine Street is of brick and masonry, and above the level of the first story is carried on the steel frame of the building. This steel frame is supported by columns which extend down to the basement line and are carried there on a system of built-up steel girders filled in with concrete, making a broad foundation for the columns.

The main rear wall of the building No. 25 Pine Street is of angle iron covered with sheet metal and is carried by columns of steel resting on corner columns of the building. The weight above the first floor is transferred to the side walls and columns and from the columns to the foundation.

The distance from the foundation line of the assay office extension building to the center of the nearest column of 27-29 Pine Street is 9½ feet.

The distance from the foundation line of the assay office extension building to the center of the nearest column of 25 Pine Street is  $5\frac{1}{2}$  feet.

The excavation for the cellar floor of the assay office building extended about 15 feet deeper than the foundations of said buildings 25 Pine Street and 27 and 29 Pine Street.

The Gallatin Bank Building which adjoins the assay office building on the east is about the same height as 27 and 29 Pine Street. The foundation of the Gallatin Bank Building extended below the proposed excavation of the assay office building.

The substrata underlying the buildings in the block in question is quicksand, extending from 2 or 3 feet below the surface to within a few feet of bedrock 50 feet below, a condition well known to contractors in New York and to claimant's engineer.

15

### *Conclusion of Law.*

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is not entitled to recover, and its petition is therefore dismissed.

### *Opinion.*

Atkinson, J., delivered the opinion of the court:

The addendum to the specifications reading as follows: "In the case of the building joining the north line of the site, the underpinning of the rear main walls must be carried to rock by a method satisfactory to the Supervising Architect," was sufficient to attract the contractor's attention to something being required which might be additional to the mere general terms of the specifications expressed in the terms "The walls, etc., will have to be removed and the excavation made in such a manner as not to endanger adjoining property \* \* \* and all necessary shoring, underpinning, etc., in connection therewith must be done."

There were two buildings joining (or practically joining) the north line of the site. This fact was open to ordinary observation—it was obvious—and no question is raised upon the fact that the condition was alike known to both parties to the contract. The insistence of the claimant is that inasmuch as the specifications, with the addendum inserted referred to "the building" he understood and had a right to understand that only one of the said two buildings was included in the terms of his bid and contract and that therefore the Supervising Architect had no right to require him to underpin the building No. 25 Pine Street. In other words, he contends that as the contract, of which the specifications are a part, used the word building instead of buildings, he was required by it to underpin one and not two buildings.

If the contract between the parties clearly refers to a particular building the main rear wall of which was to be underpinned, then claimant could not be required under the contract in question to



underpin another and distinct building under the general provision of the contract that "the decision of the Supervising Architect as to the proper interpretation of the drawings and specifications shall be final," because in such case the agreement between the parties would control, and being clear and distinct would not call for interpretation, or authorize a decision by the Supervising Architect contrary to its terms. *United States v. Stage Company*, 199 U. S., 414.

But it has been repeatedly held that parties to a contract may agree to submit differences of views in the interpretation of drawings and specifications to the decision of an architect or engineer and the validity of such an agreement is unquestionable, in the absence of bad faith, fraud, or a failure to exercise an honest judgment. *Kihlong's case*, 97 U. S., 398; *Sweeney's case*, 109 U. S., 62; *Barlow's case*, 184 U. S., 123, 133.

The court should, in construing a contract, ascertain the intention of the parties and to that end will as far as possible ascertain the situation of the parties as well as the purposes had in view. *Merriam v. United States*, 107 U. S., 437, 441; *Brawley's case*, 96 U. S.,

168, 173; *Richmond Co. v. Eureka Co.*, 103 U. S., 839, 846, 16

And we must look to all of the contract in order to find its intention, for it is not allowable to disassociate a single phrase, term, or word from the context and give to it a meaning independent of the other terms of the instrument. *O'Brien v. Miller*, 168 U. S., 287, 297.

The work contemplated by the advertisement by the Government involved excavation in an area surrounded by buildings. On the east was the Gallatin Bank Building, the foundations of which extended deeper than the proposed excavation for the annex to the assay office building; on the west was the subtreasury building; on the south the assay office building to which the addition was being made; and on the north two buildings, numbered respectively 27 and 29 Pine Street and 25 Pine Street, the rear foundations of which did not extend to the depth of the proposed excavation. The specifications admonished the contractors as follows:

"The bidders should visit the site and fully inform themselves of the character of the same and the conditions under which the work is to be performed, and failure to do so will in no way relieve the successful bidder from the necessity of furnishing any materials or performing any labor that may be required to complete the work in accordance with the true intent and meaning of the specifications and drawings without additional cost to the Government."

Under the head of "Excavation" it is among other things stated:

"Certain portions of the old foundation walls, etc., have been left in place as retaining walls in connection with adjoining buildings; the removal of these walls, and the north wall and so much of the present front building as may be necessary to install work under this contract and such other excavation in connection therewith as may be necessary are to be included."

The claimant's president visited the site of the proposed work, as did also his engineer. The surrounding conditions were known to them. They knew that there were two buildings, the rear of which



adjoined the site; one of these, 27 and 29 Pine Street, was built up of brick or masonry from the top of a one-story extension, while the other from the top of the first story extension was constructed of metallic sheets supported on the framework of the building. The weight at the rear of the building, No. 25 Pine Street, was carried on pillars at either end of the side walls, and the south ends of these walls were several feet nearer the proposed excavation than was the rear wall of the other building.

A question which naturally arises under these conditions is why did the contractor determine that the rear wall of No. 27 and 29 Pine Street was to be underpinned and No. 25 was not to be underpinned? He says the contract called for underpinning "the rear walls of a building," but which building? The building had but one rear wall and the specifications called for underpinning rear walls of a building. The extension of the east and west walls of No. 25 Pine Street toward the site of the proposed excavation, and the fact that the weight of the rear wall was carried by means of a girder to the corners, had, it seems to us, the effect of making those corners or pillars carry more weight than would have been superimposed if the rear wall had extended to the ground for support, and as a consequence any excavation near these corners would be attended  
17 with more danger to the building or walls, tending, as it would, to remove lateral support. The proof shows that these walls should have been underpinned. If the contractor was uncertain as to the meaning of the addendum to the specifications he could, upon inquiry before bidding, have been informed by the Supervising Architect.

He chose to act without making inquiry and we can not agree that the contract authorized him to select the building to be underpinned or that it meant that only one rear wall was to be underpinned. Reading the whole contract it seems to us its intention was to provide for the underpinning which the contractor was subsequently required by the architect to do.

While we doubt the relevancy and competency of the testimony adduced tending to show that the engineer who suggested the addendum to the specifications provided in his memorandum for the underpinning of the walls of the two buildings and that when this suggestion was written out "buildings" were expressed in the singular number, we do not see, if relevant or competent testimony, how the said fact can aid the claimant, because it plainly shows that the intention from the beginning was to require the underpinning of both buildings and that by a mere clerical error the word intended to be used as denoting a plural was made to denote a singular number.

Our conclusion is that the petition should be dismissed, and it is so ordered.

18      *V. Judgment of the Court Dismissing Petition.*

At a Court of Claims held in the City of Washington on the first day of June, 1914, judgment was ordered to be entered as follows:

The Court on due consideration of the premises find for the defendants and do order, adjudge and decree, that the petition of the claimant, Merrill-Ruckgaber Company, a Corporation, be, and the same is hereby dismissed.

By THE COURT.

19 VI. *Application for and Allowance of Appeal.*

And now comes the claimant in the above entitled cause and prays an appeal to the Supreme Court of the United States to review the judgment rendered herein on, to wit, June 1, 1914.

F. D. McKENNEY,  
J. S. FLANNERY,  
WM. HITZ,  
*Attorneys for Claimant.*

Filed August 25, 1914.

Ordered: That the above appeal be allowed as prayed for.  
November 9, 1914.

By THE COURT.

20

In the Court of Claims.

No. 30699.

MERRILL-RUCKGABER COMPANY, a Corporation,

vs.

THE UNITED STATES.

I, John Randolph, Assistant Clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law filed by the Court; of the opinion of the Court; of the final judgment of the Court; of the application of the claimant for, and the allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 12 day of November, A. D., 1914.

[Seal Court of Claims.]

JOHN RANDOLPH,  
*Assistant Clerk Court of Claims.*

Endorsed on cover: File No. 24,435. Court of Claims. Term No. 281. Merrill-Ruckgaber Company, appellant, vs. The United States. Filed November 12th, 1914. File No. 24,435.

